

# COOPERATIVE ASSESSMENT PROJECT (CAP) FRAMEWORK

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## Introduction

This document provides a framework<sup>1</sup> for conducting Natural Resource Damage Assessments (NRDAs) under the Cooperative Assessment Project or CAP. The CAP framework presents an alternative to the traditional process for conducting NRDAs, but is consistent with and does not modify in any way current regulations governing the conduct of NRDAs. The commitment to a restoration-based approach that includes determination of injury, quantification of loss, and evaluation of restoration alternatives still applies to the cooperative NRDA process.

CAP differs from the traditional NRDA approach by promoting full participation between natural resource trustees (Trustees) and Potentially Responsible Parties (PRPs). CAP also encourages the use of flexible and innovative approaches to settle NRDA liability and restore natural resources.

Nothing in the CAP framework is intended to be prescriptive. Moreover, the CAP framework does not impose any additional requirements above and beyond the traditional NRDA regulations. Instead, the CAP framework is intended to articulate and reinforce the concepts that help to ensure success in the conduct of cooperative NRDA efforts between Trustees and PRPs.

This framework outlines the concept and scope for conducting NRDAs under CAP. A companion document entitled "Cooperative Assessment Project (CAP) Options, Guidance on Potential Approaches and Tools" will provide more ideas on specific approaches and tools. It is hoped that these two documents will be used by NRDA practitioners in government and industry to seek prompt settlement of NRDA liability and restoration of natural resources in cooperative contexts.

## Overview of CAP

The current NRDA regulations under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Oil Pollution Act (OPA) require Trustees to invite PRPs to participate in the NRDA process.<sup>2</sup> However, under these laws and associated NRDA regulations, the level of participation between Trustees and PRPs varies considerably.

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<sup>1</sup> This framework reflects concepts and suggestions submitted by a stakeholder work group formed in January 2002 to facilitate cooperative NRDAs. The content of this framework should not be understood as an endorsement by the work group *per se*. Instead, based on the substantial background and experience of the work group, the framework should serve as a construct that will help guide cooperative NRDAs to successful outcomes.

<sup>2</sup> Trustee authority for CAP is provided at 43 CFR § 11.32(a)(2)(iii) and (d) (CERCLA final regulation), 15 CFR § 11.14(c) (OPA final regulation), and 40 C.F.R. § 300.615 (d)(2)) (NCP final regulation).

Recognizing that cooperative NRDAs are not appropriate in all circumstances, there nevertheless are circumstances where cooperative NRDA efforts could prove useful. CAP's foundation in constructive engagement among affected stakeholders may serve as a framework to streamline the traditional NRDA process that will result in benefits to all parties. Such benefits are described below.

CAP is not intended to compromise the authority or responsibility of either the Trustees or response agencies. Nor is CAP designed to complicate the relationship between PRPs and response agencies, or to slow the response process. Instead, CAP hopes to optimize the integration of response and natural resource restoration needs without jeopardizing agency responsibilities. Working within the CAP framework is intended to provide greater flexibility and potential cost-effectiveness than may be obtained during a more traditional NRDA.

### **Incentives under CAP**

For PRPs, greater participation in the NRDA process may offer substantial incentives. Some of the more important PRP incentives include: reducing transaction costs and time commitments by PRP staff and contractors; resolving liability and reaching closure in a timely fashion; investing in restoration rather than preparation for litigation; enhancing predictability and certainty relative to the objectives, scope, outcome, timing, and budget of a project; receiving positive recognition from the Trustees and the public; and strengthening relations among all stakeholders.

For Trustees, many of the PRP incentives also apply. However, Trustees may further benefit by: restoring contaminated sites that might not otherwise be addressed or be addressed more slowly; and receiving PRP funding upfront or through timely reimbursement to participate in a cooperative NRDA project.

For non-government organizations, providing an opportunity for early and continued public involvement represents an incentive for their commitment in a cooperative NRDA effort. When successful, cooperative NRDAs should also allow Trustees to increase program outputs in the form of restoration by reducing the expenditure of resource on litigation and other adversarial processes. Thus, the public benefits from the accomplishment of more restoration.

### **Components to CAP**

There are two components to the CAP effort. The first component includes the formation of a work group that includes representatives from industry, response agencies, environmental interest groups, and tribal, state and Federal natural resources Trustees (see <http://www.darp.noaa.gov/cap.htm> for further information on CAP). The CAP work group provides input on the CAP effort, including how best to conduct outreach. CAP is intended to serve as a clearinghouse for the collection and dissemination of lessons learned about innovative NRDA approaches. The work group also serves as a liaison to their respective stakeholder communities on CAP efforts. The CAP work group will not direct or participate in CAP projects, unless explicitly

requested to do so by the parties engaged in that project. The second component of CAP focuses on identifying and encouraging cooperative NRDA projects so that lessons learned can be shared among government and industry practitioners.

### **Potential CAP Projects**

Cooperative NRDAs can be appropriate for many types of cases. For purposes of addressing sites under CAP however, the selected sites should be affected by chronic hazardous substances or oil contamination. Focusing on chronic conditions allows more time to create partnerships and develop cooperative approaches than would be allowed by the typical catastrophic spill, and provides opportunities to integrate response and restoration actions. CAP projects will be considered where there is a potential NRDA liability under CERCLA (National Priority List (NPL) and non-NPL sites), OPA, Resource Conservation or Recovery Act, or other appropriate regimes - be they Federal- or state-lead sites.

CAP will consider projects where Trustees have jurisdictional authority, where affected parties are willing and capable to commit to the project, and where injuries to natural resources and their services are sufficient for affected parties to engage in the project. The scope of CAP, however, should not be constrained by complexities related to the nature of contamination, parties involved, or other factors. CAP will contemplate projects where:

- Cleanup is planned or underway such that Trustees and response agencies can integrate their respective efforts;
- Response agencies have decided on a response, or concluded response actions; or
- Response agencies will not be involved, but PRPs are willing to address restoration while mitigating response concerns.

In all the above circumstances, the Trustees will first consult with the appropriate response agencies to address any response issues up front. In the last circumstance where response agencies decide not to be involved in a CAP project, the Trustees will ensure that the affected response agencies will be kept informed of the CAP process if a cooperative NRDA is initiated.

### **Suggestions for Getting Started on a CAP Project**

To achieve success, a cooperative NRDA must be balanced by ground rules that define the assessment process yet allow for sufficient flexibility to save time and money, and to adapt to changes in project circumstances. This section is intended to provide some fundamental concepts for parties considering a CAP project prior to engaging in that project. These concepts are organized according to the general sequence of events expected for CAP projects.

### Proposing CAP Projects

When a project is proposed for CAP consideration, it is the responsibility of the potentially affected Trustees to determine whether the project fulfills the CAP project criteria. As stated previously, the Trustees will determine whether they have jurisdictional authority, whether the parties affected by the project (namely the Trustees and PRPs) are willing and capable to commit to the project, and whether injuries to natural resources and their services are sufficient for the affected parties to engage in the project.

Ideally, all Trustees that have jurisdictional authority would be at the table and agree on a common approach to the project. However, where certain Trustees support but decide not to participate in a CAP project, they will be kept informed on project activities by the participating Trustees. Reasons that Trustees may not wish to participate in a CAP project may include the nature and extent of injury does not justify their participation, the injured resources that are under their jurisdiction will be adequately addressed by other participating Trustees, or the resources necessary to devote to the project may not be available. Non-participating Trustees can join in a settlement or enter a CAP project effort prior to settlement as long as prior decisions made by the participating Trustees will not be revisited without new and substantive information.

PRPs should have the opportunity to fully participate in a CAP project. Where PRPs wish to participate in a CAP project, Trustees and PRPs should address statute of limitations issues, and particularly, evaluate whether a tolling agreement is appropriate.

Sites with multiple PRPs will present additional complications and challenges, e.g., some PRPs may not want to work cooperatively with the Trustees. For such sites, Trustees and PRPs should evaluate if and when a NRDA following the CAP concepts would proceed.

According to federal law, PRPs are responsible for paying reasonable costs incurred by Trustees in conducting a NRDA. Payment of these costs should be discussed at the outset of a CAP project. In many instances, Trustees will seek payment of costs in advance on a periodic basis, with cost documentation submitted to the PRP before approval of a subsequent cost request. In addition, PRPs will often be asked to pay for scientific studies and expert consultants needed to support the CAP project. Funds for these purposes may be provided to the Trustees on a project-by-project basis, or the PRP may be asked to execute contracts directly to expedite the administrative process.

Agreements on the CAP process, protections, funding, and other mutual arrangements should be reached at the outset of a CAP project. Such agreements may address project-specific concerns collectively or individually as circumstances warrant.

Prior to accepting a CAP project, Trustees and PRPs will also coordinate with response agencies (Federal and/or state) to ensure that proposed actions under CAP do not interfere with or duplicate planned or on-going response actions. Where response actions are planned or on-going at a proposed project, Trustees and PRPs will work

with response agencies to determine how to optimally integrate proposed CAP actions with response actions as early as possible. For example, the parties should consider how best to: gather and share response and NRDA data in a cost-effective manner; conduct response and NRDA investigations for the benefit of all parties; and provide advice on potential liabilities associated with various response and NRDA options. Where response actions are not planned or on-going at a proposed project, Trustees and PRPs will determine how best to apprise the response agencies about the progress of the CAP project and how best to address possible cleanup concerns in the absence of a response action by the response agencies.

### Conducting CAP Projects

As with the traditional NRDA regulations, Trustees involved in a CAP project are accountable to the public for the conduct and outcome of the project. While CAP encourages PRPs to conduct injury assessment and restoration planning as appropriate, Trustees cannot forgo their responsibility to approve and oversee NRDA actions taken on the part of PRPs.

The traditional NRDA regulations require sharing information with the public and seeking input from the public. Under CAP, Trustees and PRPs will jointly take responsibility for the sharing of public information. Consistent with the traditional NRDA regulations, the Trustees and the PRPs will also ensure compliance with applicable Federal and state laws.

The success of cooperative NRDAs may be attributed to a number of characteristics that have evolved among Trustees and PRPs in addressing cases. These characteristics are listed as follows and are incorporated in this framework.

- Coordinate between the Trustees
  - All Trustees are at the table
  - Trustees agree on a common approach
- PRPs are invited to fully participate
- Communicate with the public
- Commit to a Cooperative Restoration-Based Approach
  - Negotiate a restoration-based settlement with a focus on in-kind restoration
  - Consider site-specific agreements that address process, protection, and funding (alternatively, consider existing umbrella agreements where possible)
- Integrate Restoration Concerns Early into the Response Process
  - Consider cost-effective data collection and sharing using
    - Response-related data, e.g., remedial investigation, ecological risk assessment, etc.
    - Literature benchmarks
    - NRDA site studies as needed
    - Stipulations
  - Provide advice on NRDA liability associated with various response options

As previously stated, critical to the success of CAP projects is a flexible NRDA process that will allow for refinements, iteration, and the ability to address scientific and technical uncertainties in a manner that protects the public interest in natural resources. Consequently, the parties will balance the use of reasonable assumptions against the need to conduct additional studies.

When considering additional studies, the parties will address the need for and relevance of such efforts. The parties will collect or share information, and have the opportunity to participate in or oversee planned project activities.

In lieu of conducting additional studies, the parties may agree to stipulations. Stipulations may include agreements by the parties concerning the disposition of some relevant point, and may be easily documented through technical or general memoranda. These stipulations may serve as the basis for decisionmaking and will not be reconsidered except where justified by new, substantive information.

The parties will document information considered in making decisions for the project. This information will be readily available and accessible to the public in some form of public record, subject to privileged or confidentiality information that would ordinarily be protected even outside of the CAP context. Trustees are responsible for establishing and maintaining this public record. As part of the public record, the parties will provide the restoration plan for public review, which will be the basis for resolving the project.

If disagreements arise during the conduct of a cooperative NRDA, the parties should have a prearranged method for resolving such disagreements without unduly disrupting the continuation of the assessment.

#### Ending CAP Projects

Upon completion of a NRDA and consistent with the traditional NRDA regulations, the PRPs may be allowed to implement the selected restoration alternative as identified in the restoration plan. Where appropriate, CAP encourages PRPs to implement the selected restoration alternative.

Either the Trustees or the PRPs may withdraw from a CAP project at any time, for any reason. Any information developed up to that point may be used by any party for any purpose. The Trustees may pursue a traditional NRDA, and the PRPs would be free to engage that process using any strategy that they might select.

In cases where the PRPs have agreed to pay Trustee costs as they are incurred, upon termination of the project, the PRPs will compensate Trustees for all costs up until the point the project is terminated.